

July 16, 2002

Presiding Judges, Superior Courts of Arizona
Judges, Superior, Justice of the Peace, and Municipal Courts of Arizona
Court Administrators, Superior, Justice of the Peace, and Municipal Courts of Arizona
Clerk of Court, Superior Courts of Arizona
Chief Clerks, Justice of the Peace, and Municipal Courts of Arizona

RE: Interpretation of Brady firearms prohibition {18 USC 922 (g)(8)C (ii)}

Arizona has emphasized two ways in which the Brady firearms prohibition can attach in Order of Protection (OP) cases: there must be either a finding of credible threat or a restraint on the defendant's conduct. In the belief that the words "explicitly prohibits" in Brady were meant to be taken literally, judges have been trained that both Box 6 (finding of credible threat) and Box 10 (Federal intimate partner) had to be checked on our OP to invoke Brady. This will change due to our evaluation of current federal practices. Only Box 10 will need to be checked in the future for Brady to apply.

A recent case, US v. Emerson, 270 F.3rd 203 (5th Cir. 2001), held that a specific finding of credible threat need not be made for the Brady firearms prohibition to attach. Emerson also notes that a finding of credible threat is not required if, alternatively, there is language prohibiting the use (actual, threatened or attempted) of physical force that reasonably would be expected to cause bodily injury. When the order says "do not assault," this language clearly is a restraint on conduct and that, in turn, invokes the Brady prohibition.

Under the federal interpretation, the language used in paragraph number one on Arizona's OP form is sufficient to satisfy Brady after a hearing involving intimate partners even without specific use of the particular words contained in the federal statute.

The Bureau of Alcohol, Tobacco and Firearms (ATF) is now training law enforcement to the effect that the federal Brady attaches on OPs issued after a hearing involving intimate partners where the defendant had received actual notice and the opportunity to be heard. An opportunity for the defendant to be heard is still a hearing for purposes of Brady application, regardless whether the defendant appears for the hearing.

To bring Arizona closer in practice with the federal statute, ATF's training and the implications of Emerson, the Domestic Violence Benchbook, the OP forms and judicial training will be revised to reflect the changes. Due to the new interpretation, the requirements for invoking Brady are now:

- If the Order that was issue ex parte is not changed at a hearing for which the defendant had notice and an opportunity to be heard and if the parties meet the Federal intimate partner

test, the Notice to the Sheriff of Brady Disqualification should be generated. It is neither necessary nor preferable to generate a new Order just to indicate the Brady prohibition.

- If the Order is modified at a hearing or generated after a hearing and if the parties meet the Federal intimate partner test, Box 10 must be checked. The modified Order would need to be re-served.

Additionally, several more revisions to training, the forms and the DV Benchbook will be made to incorporate recent legislative changes. Specifically these are: the removal of service fees for orders of protection; the removal of service fees for injunctions against harassment if the case arises from a dating relationship; and clarification that modified order of protection or injunction against harassment is effective upon service.

If you have any questions, please contact Catherine Drezak at: cdrezak@supreme.sp.state.az.us or by telephone at (602) 542-9607.

Sincerely,

Janet Scheiderer
Director, Court Services Division